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In The

Supreme Court of the United States

October Term, 1998

MARITIME OVERSEAS CORPORATION,

Petitioner,

v.

RICHARD ELLIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Texas

RESPONDENT RICHARD ELLIS' BRIEF IN OPPOSITION

JOHN M. O'QUINN
KENDALL MONTGOMERY
O'QUINN & LAMINACK
2300 Lyric Centre Building
440 Louisiana
Houston, Texas 77002
(713) 223-1000

JOE H. REYNOLDS
SCHWARTZ, JUNELL, CAMPBELL & OATHOUT, L.L.P.
1221 McKinney, Suite 1000
Houston, Texas 77010
(713) 752-0017

EUGENE A. COOK
Counsel of Record
WARREN W. HARRIS
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana St., Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

GAEL PLAUCHE
12515 Queensbury Lane
Houston, Texas 77024
(713) 468-1136

Counsel for Respondent Richard Ellis

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT RICHARD ELLIS' BRIEF IN OPPOSITION

Respondent Richard Ellis (Ellis) respectfully requests that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Ellis clarifies the following facts that have been misstated or incompletely stated by petitioner Maritime Overseas Corporation (Maritime).

A. Undisputed facts.

1. Maritime has not challenged the jury's causation finding.

Maritime fails to mention how causation was submitted to the jury in this case. The liability question to the jury was as follows:

> Question No. 1
>
> Was Maritime Overseas Corporation negligent on any of the occasions in question and did such negligence play any part, even the slightest, in *producing injury* or illness to Richard Ellis?
>
> Answer "Yes" or "No."
>
> Answer: Yes

(Tr. 11) (emphasis added). Question No. 6, the damages question, was conditioned on an affirmative answer to a liability question. (Tr. 16) ("In the event you answer

Question Nos. 1, 2 or 3 'yes', and only in that event, then answer Question No. 6.").

In its motion for new trial, Maritime challenged the sufficiency of the evidence to support the damages finding in Question No. 6, (App. K-1 to K-7; *see also* Pet. 4), but did not challenge the jury's causation finding in Question No. 1. It is undisputed that Maritime has never challenged the jury's causation finding in answer to Question No. 1.

2. Maritime does not dispute it was negligent.

Maritime does not dispute that its negligence exposed Ellis to undiluted diazinon. (Pet. 3, 14; *see also* App. A-9). Maritime also does not dispute liability for Ellis' short-term injuries. (Pet. 3).

3. Maritime does not challenge the admissibility of the testimony of Ellis' experts.

Maritime did not trigger the gatekeeper function of the trial court by making complaints based on the relevance or reliability of Ellis' expert testimony at or before trial. Maritime did not make any objection to the reliability of Ellis' experts before trial. (A-14 to A-15). Maritime admits it did not challenge the admissibility of Ellis' expert testimony at trial. (Pet. 23). During trial, Maritime made only nine objections to Ellis' five expert witnesses, eight were objections to Dr. Ezrailson's testimony, (S.F. 495, 506, 510, 523, 525, 538, 558, 559), one was an objection to Dr. Carter's testimony, (S.F. 938), and

there were no objections at all to Drs. Johnson, Waickman, or Austin. Five objections complained about responsiveness, three objections were to leading questions, and one complained the witness was testifying from a document that was not in evidence. (App. A-14).

Maritime then attempted to complain for the first time after verdict that the testimony of Ellis' five experts does not support the judgment. (App. A-12, A-14 to A-15). On appeal, however, Maritime did not complain–and does not complain in this Court–about the trial court's admission of any of the scientific evidence from any of Ellis' five experts. (*See* App. A-10, A-12, A-14 to A-15).

B. Ellis' experts provided sufficient evidence of causation.

Ellis presented as an expert, without objection, Dr. Edward Ezrailson, a highly qualified toxicologist and trained scientist who explained the poisonous toxic effects of organophosphate diazinon on human beings. He produced numerous books and scientific and medical articles on the subject. (P. Ex. 12, 13, 14, 16; S.F. 387, 487, 489, 495, 511, 514, 516, 544-47, 550-51, 553-54). He testified there have been numerous studies on the effects of organophosphates on exposed workers as well as laboratory animals. (S.F. 379-80, 411). He also testified that there are "epidemiological" studies sanctioned by the EPA on workers verifying that organophosphate poisoning can damage permanently the human nerves and central nervous system in the brain. (S.F. 486; P. Ex. 72).

Dr. Ezrailson further testified positively, unequivocally, and without objection that the scientific and medical research literature, when read and interpreted by a trained toxicologist, such as himself, establishes that organophosphate diazinon can cause permanent central nervous system and nerve damage, especially in the brain. (S.F. 369, 371, 451, 454-55, 537, 936-37). Additionally, Dr. Ezrailson explained the scientifically known mechanism by which organophosphate diazinon causes nerve damage at the molecular level. (S.F. 383-400, 451-55, 936-37).

Dr. Frances Waickman, based on his personal experience from treating and following other patients who had been exposed to organophosphates like diazinon, concurred with Dr. Ezrailson about the state of scientific/medical knowledge of the potentially harmful effects of organophosphate poisoning including the central nervous system damage. (S.F. 775, 781). He testified, without objection, that organophosphate diazinon can cause central nervous system damage such as that demonstrated by Ellis and, in fact, did cause Ellis' central nervous system damage. (S.F. 745-47, 750, 756, 759, 766-69, 779). Dr. Johnson agreed with Drs. Ezrailson and Waickman that diazinon can affect nerves all over the body, the central nervous system, and the brain. (S.F. 584-87).

The jury had before it testimony and exhibits establishing that Ellis' personal injuries were caused by his exposure to diazinon. Ellis' hospital records state the diagnosis of "organophosphate exposure." (P. Ex. 20, 21). The records contain medical findings of "myopia with accommodation spasm" (pupil constriction), muscle twitching and muscle weakness, plus other symptoms.

(S.F. 735-36, 738, 740; P. Ex. 20, 21). Treating physicians testified these clinical findings reflect neurotoxic nerve impairment and damage from organophosphate poisoning. (S.F. 735-36, 738-41, 747, 772, 774, 779, 844). Dr. Butler's diagnoses reflect Ellis suffers organic brain damage caused by exposure to organophosphate onboard the ship. (Supp. S.F. 44-45, 56).

Ellis' three treating doctors, Drs. Carter, Waickman, and Johnson, and two treating psychologists, Drs. Butler and Austin, testified that Ellis has permanent central nervous system brain damage as a result of the poisoning. (S.F. 590, 596, 630, 736, 741, 759, 766, 781-83, 849, 892, 909, 943, 1136). Dr. Waickman testified that he had consulted with EPA experts about the EPA's information and conclusions regarding the health hazards of organophosphates like diazinon; the EPA confirmed to him that Ellis' symptoms, illness, and clinical findings were caused by his organophosphate diazinon poisoning. (S.F. 796).

In sum, the record establishes that organophosphates cause the type of injuries suffered by Ellis, that diazinon causes such injuries, and that in this case, exposure to diazinon caused Ellis' injuries.

REASONS WHY THE PETITION SHOULD BE DENIED

This is an error preservation case dealing with state procedures governing preservation of the right to have evidentiary rulings reviewed in the state appellate courts. This Court should deny Maritime's petition because the petition raises no important federal question, because the decision below does not conflict with any decision of this

Court, and because the decision below is based on independent and adequate state grounds.

In this case Maritime tries to challenge on appeal several things it did not challenge in the trial court. First, Maritime attempts to complain about causation when it never challenged the jury's causation finding in Question No. 1. Second, Maritime tries to challenge Ellis' expert witnesses when it never objected to their testimony at or before trial. Maritime should not be allowed to make these desperate challenges for the first time on appeal.

I. A Jones Act Plaintiff Is Not Required to Establish "Two Causal Connections."

Maritime's petition raises no important federal question meriting this Court's attention. The decision of the Texas Supreme Court is consistent with prior decisions of this Court, and it does not conflict with any decision from a federal court of appeals. *See* SUP. CT. R. 10 (b), (c). On this basis alone, the Court should deny the petition. Maritime nevertheless argues that this Court should "clarify" that a Jones Act plaintiff has to establish "two causal connections." (Pet. 6-9). Maritime's argument is without merit for several reasons.

Maritime asks this Court to address "the body of law generated by the Jones Act" because it is in "dire need of attention." (Pet. 6 n.5). This certainly is not the case for this Court to address the entire body of Jones Act law. Further, the lower courts appear to be managing quite well under this Court's decisions such as *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). *See, e.g., Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 334-39 (5th Cir. 1997)

(clarifying standard for contributory negligence under the Jones Act). Although Maritime claims that this issue "commands attention" by this Court and that this area of law is in "urgent need of clarification," (Pet. 6), Maritime never quite explains why this case presents such a sense of urgency.

A. Maritime has attempted to create a "second causal nexus" because it never challenged the jury's causation finding.

As discussed above, it is undisputed that Maritime never challenged the jury's causation finding in Question No. 1. *See supra* pp. 1-2. It is only because of this failure to challenge the jury's causation finding that Maritime has had to attempt to create a "second causal nexus" so that it can attempt to challenge causation through the damages finding. This Court should not grant the petition –and allow Maritime to create a new causation requirement–when Maritime's sole purpose is to challenge indirectly what it failed to challenge directly.

B. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), has no application to this Jones Act case.

Maritime's entire argument under its first reason for granting the writ hinges on there being "two causal connections" in a Jones Act case. (Pet. 6-22). Maritime relies on *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), as authority for its "two causal connections" theory. Maritime complains that the Texas Supreme Court "failed to even mention this hard and fast rule." (Pet. 13;

see also Pet. 22). The reason why is obvious: *Morgan* has nothing to do with the Jones Act or any issue relevant to this case.[1]

In *Morgan*, the Texas Supreme Court clarified what a plaintiff must prove under Texas law in a default judgment proceeding in order to establish unliquidated damages. *See id.* at 731. After considering rule 243 of the Texas Rules of Civil Procedure, the court found that although a defendant's failure to appear establishes its liability, the rule requires the plaintiff to present some evidence linking its injury to the event sued upon. *Id.* at 732.

Unlike *Morgan*, this case does not involve a default judgment or the application of rule 243 of the Texas Rules of Civil Procedure. Further, *Morgan* did not involve a Jones Act claim and did not address Maritime's argument that a plaintiff in a Jones Act case carries a heightened burden of proof with respect to proving causation and, therefore, damages. Further, no court ever has adopted *Morgan*'s reasoning in a Jones Act case.

Because *Morgan*, and therefore Maritime's "two causal connections" theory, are not applicable in this Jones Act case, there is no reason for the Court to review any of Maritime's arguments on this issue.

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[1] Maritime first cited *Morgan* and raised this argument in a Supplemental Brief in the Texas Supreme Court–the *fourth* brief Maritime filed in that court. Maritime did not raise this issue in the state court of appeals and did not raise it in the Texas Supreme Court in its Application for Writ of Error, Reply Brief, or Response Brief, *i.e.*, surrejoinder.

C. The creation of a "second causal nexus" would eliminate the reduced causation standard in a Jones Act case.

The Texas Supreme Court's analysis of the Jones Act is consistent with this Court's prior decisions. Nothing in Jones Act or Federal Employers' Liability Act (FELA) case law requires that plaintiffs prove causation twice, once in the liability context and again in the damages context. The Jones Act does not permit the doubling of a plaintiff's burden of proof; rather, the Jones Act authorizes a lower standard on causation. And Maritime concedes that there is a reduced, or "featherweight," burden of proof on the issue of causation in a Jones Act case. (Pet. 7 & n.6). *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (citing *Rogers*, 352 U.S. at 500); *see also Gautreaux*, 107 F.3d at 335 ("the Supreme Court used the term 'slightest' to describe the reduced standard of causation"). Maritime claims, however, that this reduced causation standard is inapplicable in this case because it applies only to what Maritime calls the "first causal nexus." (Pet. 7-8, 11-13, 14).

In a Jones Act case, a seaman is entitled to recover if "employer *negligence* played any part, even the slightest, in *producing* the *injury* or death for which damages are sought." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957) (emphasis added). Thus, in a causation analysis in a Jones Act case, courts focus on whether the *negligence* was the *cause* of the *injury*. *See, e.g., id.* at 506-07; *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949); *see also Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (causation is the relation between

"the employer's negligence and the employee's injury"); *Chisholm v. Sabine Towing & Transp. Co.*, 679 F.2d 60, 62 (5th Cir. 1982) (issue was whether condition was the "cause of plaintiff's injury"); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965) (describing causation under FELA as "the relation of the negligence to the injury"). This well-established standard was applied by the Texas Supreme Court in this case. (App. A-5).

The effect of Maritime's argument that a higher standard of causation applies to the "second causal nexus" is to eliminate the reduced causation standard in a Jones Act case altogether because Maritime's "second causal nexus" is what this Court defines as causation. Maritime describes the "second causal nexus" as the question of "[w]hether the event sued upon *caused* the *injury*." (Pet. 13) (emphasis added). That, however, is exactly how this Court describes causation in a Jones Act case: whether "employer negligence . . . *produc[ed]* the *injury* . . . for which damages are sought." *Rogers*, 352 U.S. at 506 (emphasis added). To adopt Maritime's dual causation requirement–and adopt a higher causation standard for the "second causal nexus"–this Court would have to overrule *Rogers* and its progeny and rewrite over forty years of law in this area.

In arguing that the Texas Supreme Court erred in not imposing a higher standard of causation for the "second causal connection," Maritime cites three decisions that are supposedly also "wrongly decided." (Pet. 18). Two of these decisions, however, do not involve the Jones Act or FELA. *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 836 (3rd Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (CERCLA, common law tort, and medical monitoring doctrine

claims); *Boeing Co. v. Shipman*, 411 F.2d 365, 367 (5th Cir. 1969) (en banc) (diversity case based on Alabama common law and statutory claims). The third case merely recognizes that this Court in *Rogers* established a lower threshold for causation in FELA cases. *See Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 267-68 (3rd Cir. 1991) (citing *Rogers*, 352 U.S. at 506). Maritime is not able to cite even one Jones Act case where the "second causal connection" issue it attempts to raise here has been presented. Maritime also cites no decision of this Court that is in conflict with the Texas Supreme Court's decision in this case. *See* SUP. CT. R. 10(c).

The issue raised by Maritime in this case–the standard of causation in a Jones Act case–has been authoritatively decided by this Court in *Rogers*. Simply put, there is but one causation requirement in a Jones Act case, and that standard has been clearly and unequivocally defined by this Court. Maritime's "two causal connection" theory is simply a belated attempt to challenge through the damages finding what it failed to challenge directly in the jury's causation finding in Question No. 1.

D. Granting the petition would be futile because Maritime has already received a review of the evidence under the standard it requests.

When asking the Court to create a "second causal connection," Maritime also asks the Court to place a higher burden of causation on a Jones Act plaintiff. Maritime argues that its new "second causal nexus" must be proven by a preponderance of the evidence. (Pet. 14-15; *see also* App. K-33). Such relief by this Court would be an

exercise in futility because Maritime has already received the review it requests.

The state court of appeals in this case did in fact review the sufficiency of the causation evidence under both a "featherweight" standard as well as the higher preponderance of the evidence standard under Texas common law. (*See* App. A-9). Because the judgment of the court of appeals is conclusive on questions of fact, the Texas Supreme Court does not have jurisdiction to make such a factual determination. TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.225(a) (Vernon 1988). (*See* App. A-7, A-9). Thus, a remand would only send the case to the state court of appeals to review the evidence under a traditional factual sufficiency analysis, which it has already done. (*See* App. A-9).

E. Conclusion.

Maritime argues that the paternalistic underpinnings of the Jones Act are "astonishingly passe," given social and technological improvements since adoption of the Act. (Pet. 11). Maritime's policy argument offers no legitimate or compelling basis for granting certiorari. "Policy considerations" are "for Congress to weigh." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.12 (1982). This Court may not "ignore the language and history" of a statute, even if the Court "disagree[s] with the legislative choice." *Id.*; *see, e.g., Rogers*, 352 U.S. at 509 (although the Jones Act may have "shortcomings," "Congress has not seen fit to substitute that scheme. . . . "); *see also Wilkerson v. McCarthy*, 336 U.S. 53, 66 (1949) (Frankfurter, J., concurring) (courts must enforce FELA "however outmoded and

unjust in operation it may be"). Here, the legislative choice of Congress–over forty years after *Rogers*–is to maintain a system protective of seamen.

In its petition, Maritime jumps from Jones Act cases to toxic tort cases and then to all cases in the "non-Jones Act context." (Pet. 17; *see also* Pet. 19). Maritime then argues that "[w]hether in the admissibility context or the sufficiency context," there is a "need for reliable scientific testimony in the context of complex toxic torts, whether in Jones Act suits or otherwise." (Pet. 19). As this discussion demonstrates, Maritime wants to argue everything *except* damages–the only complaint that Maritime made in its motion for new trial.

Maritime seeks to have this Court review a lower court decision that turns solely on an analysis of the particular facts involved. *See* SUP. CT. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). It is well settled, however, that this Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This case does not present the opportunity for the Court to address the broad range of issues Maritime now attempts to raise. This Court in *Rogers* and its progeny has repeatedly reaffirmed the causation standard in a Jones Act case, and Maritime presents this Court with no substantial reason for changing that standard.

II. The Texas Supreme Court's Decision Is Based on Independent and Adequate State Grounds.

A. Maritime waived its challenge to Ellis' expert witnesses.

Maritime next challenges the Texas Supreme Court's decision that Maritime had not properly preserved its complaints to Ellis' experts. This argument does not justify granting the petition because the Texas Supreme Court's decision is based on an independent and adequate state ground: the requirement for preservation of error under rule 702 of the Texas Rules of Evidence. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) (explaining "reverse-*Erie*" doctrine). This Court has consistently held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). This rule applies whether the state law ground is substantive or procedural. *See Coleman*, 501 U.S. at 729.

In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Id.* Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *Id.* "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could

amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

In the Texas Supreme Court, Maritime argued state law as a ground for review of the expert testimony. Maritime argued that the court "should be 'informed by reference to the evolving common law' in determining the standards for weighing expert testimony. . . . In other words, this Court should employ the standards announced in *Daubert*, *Robinson*, and *Havner*. . . ."[2] (App. K-36) (citation omitted). The Texas Supreme Court acknowledged this request to also use state law as a ground for reviewing Maritime's challenge. (*See* App. A-10) ("Maritime argues that the federal standard articulated in *Daubert and the state standard* articulated in *Robinson* and *Havner* are the proper standards for reviewing the sufficiency of Ellis's damages evidence.") (emphasis added).

The Texas Supreme Court held that Maritime could not complain for the first time after verdict that the testimony of Ellis' experts did not support the verdict. (App. A-15). The court held that to preserve a complaint that an expert's testimony is unreliable and, therefore, no evidence, a party must object to the evidence before trial or when the evidence is offered. (App. A-11) (citing *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995); *Merrell Dow Pharms., Inc. v. Havner*, 953

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[2] *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995), and *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998), are Texas Supreme Court decisions interpreting rule 702 of the Texas Rules of Evidence.

S.W.2d 706, 713 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998)). The Texas Supreme Court reasoned that to allow otherwise would deny Ellis' experts the opportunity to pass muster in the first instance and usurp the trial court's discretion as the gatekeeper. (App. A-15) (citing *Havner*, 953 S.W.2d at 720; *Robinson*, 923 S.W.2d at 554). As requested by Maritime–and as indicated by the Texas Supreme Court's citation to its decisions in *Robinson* and *Havner*–the court analyzed the issue in light of the state law standard.[3]

The Texas Supreme Court's decision is based on preservation of error under rule 702 of the Texas Rules of Evidence. In its holding, the Texas Supreme Court relied on its prior decisions in *Havner* and *Robinson*. (App. A-11, A-15). The Texas Supreme Court's decision regarding error preservation under rule 702 of the Texas Rules of Evidence is a procedural state law issue not subject to review by this Court.

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[3] Maritime claims that the Texas Supreme Court "felt compelled to follow its misinterpretation" of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and, therefore, this Court should correct the Texas Supreme Court's misunderstanding of the federal rule. (Pet. 25). Even if the Texas Supreme Court misinterpreted *Daubert*, this Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956). Moreover, Maritime ignores that the Texas Supreme Court cites its own decisions, *Robinson* and *Havner*, in its interpretation of rule 702 of the Texas Rules of Evidence. (App. A-11, A-15). "We have properly decided the case on the issues preserved at trial and raised on appeal, *as our rules and precedent require.*" (App. A-16) (emphasis added).

B. Maritime also waived its objection under the federal rule.

The same result reached by the Texas Supreme Court under rule 702 of the Texas Rules of Evidence should be reached under rule 702 of the Federal Rules of Evidence.[4] The only other case to address the issue presented in this case reached the same result as the Texas Supreme Court. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 942 (1997).

In *Babbitt*, Pacific Lumber raised a *Daubert* challenge in its pretrial Objections to Evidence, but never requested a ruling. 83 F.3d at 1066. On appeal, Pacific Lumber asserted its *Daubert* challenge in the context of an insufficient evidence argument, not a challenge to the admission of the evidence. *Id.* Pacific Lumber argued that because the expert's testimony was unreliable, it was insufficient to support the district court's judgment. *Id.* The court of appeals rejected that argument, holding that the time to raise a *Daubert* challenge is at trial. *Id.* The court reasoned that allowing Pacific Lumber to challenge on appeal the reliability of the scientific testimony, in the guise of an

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[4] Maritime suggests that "the Court may wish to hold this case for [*Kumho Tire Co. v.*] *Carmichael.*" (Pet. 25 n.20). The issue in *Kumho Tire* is whether an engineering expert's testimony that implicates scientific principles, but that is based on the expert's experience, is subject to a *Daubert* analysis. *See Kumho Tire Co. v. Carmichael*, No. 97-1709 (Pet. i) ("May a trial judge consider the four factors set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in a Rule 702 analysis of admissibility of an engineering expert's testimony?"). This case has nothing to do with the issue before the Court in *Kumho Tire*.

insufficient evidence argument, would give Pacific Lumber an unfair advantage; Pacific Lumber could gamble on a favorable judgment in the district court, knowing that it could seek reversal on appeal because of its failure to obtain a ruling on its objections. *Id.* at 1067. The court of appeals refused to allow such a result.

In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), this Court decided the standard for admitting expert scientific testimony in a federal trial and focused on the trial court's gatekeeper function under rule 702. 509 U.S. at 582, 589. Under the rule proposed by Maritime, however, the trial court would no longer act as a gatekeeper. A party would not have to object to evidence when it was offered–thereby invoking the trial court's gatekeeper function–but could sit silently and then challenge on appeal the sufficiency of the evidence. That approach was rejected by the court in *Babbitt*: "[Pacific Lumber's] insufficiency argument is identical to the [*Daubert*] admissibility objection which it waived." 83 F.3d at 1066.

Maritime asks this Court to hold for the first time that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are sufficient to preserve error for a challenge to an opponent's expert witnesses.[5] (Pet. 25-26) (citing

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[5] It is interesting that Maritime claims the statement that "conventional devices" discussed in *Daubert* have been the subject of "recurring misinterpretation." (Pet. 26). The two decisions addressing the issue–*Babbitt* and this case–have both reached the same correct result.

Daubert, 509 U.S. at 596). Maritime cites no authority to support its position that cross-examination and presenting contrary evidence can somehow preserve a challenge to the reliability of expert scientific testimony. This is because there is none. Maritime's plea for the Court's "clarification" of this issue rings hollow.

This Court should not allow Maritime to lie behind the log at trial and then on appeal dress up a *Daubert* objection–which it chose not to make when the experts' testimony was admitted–as a challenge to the sufficiency of the damages evidence. The implications of a rule that a party no longer has to object to evidence when it is offered will be enormous.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EUGENE A. COOK
Counsel of Record
WARREN W. HARRIS
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana St., Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

JOHN M. O'QUINN
KENDALL MONTGOMERY
O'QUINN & LAMINACK
2300 Lyric Centre Building
440 Louisiana
Houston, Texas 77002
(713) 223-1000

JOE H. REYNOLDS
SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, L.L.P.
1221 McKinney, Suite 1000
Houston, Texas 77010
(713) 752-0017

GAEL PLAUCHE
12515 Queensbury Lane
Houston, Texas 77024
(713) 468-1136

Counsel for Respondent
Richard Ellis

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